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Tran Thi Tat v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL
NO T-05(M)-146-04 OF 2017(VNM)
UMI KALTHUM, HARMINDAR SINGH AND STEPHEN
CHUNG JJCA
8 JULY 2019

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Criminal Law — Appeal — Appeal against conviction and sentence — Offence of trafficking in dangerous drugs — Trial judge found appellant guilty of trafficking in dangerous drugs — Appellant convicted and sentenced — Whether there was appealable error — Whether conviction safe — Whether case proven beyond reasonable doubt — Dangerous Drugs Act 1952 s 39B(1)(a) & (2)

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Criminal Procedure — Mens rea — Knowledge — Trial judge found appellant guilty of trafficking in dangerous drugs — Appellant convicted and sentenced — Whether appellant had knowledge of drugs — Whether appellant innocent carrier

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The appellant was charged at the Kuala Terengganu High Court for trafficking in dangerous drugs. After trial the appellant was found guilty and convicted and sentenced to death. The appellant arrived at the Kuala Terengganu Airport via a transit flight from Kuala Lumpur. SP4 and SP5 observed the appellant walking slowly carrying a large bag with hesitation. The appellant was then detained and instructed to bring the bag to a room for inspection. Upon a close inspection, they saw a corner of the bag which had been prised opened and cello-taped over in which they found a brown envelope, after removing the inside lining of the bag, another envelope was found. Both envelopes were found to have contained methamphetamine. In the present appeal, the issue raised was whether the appellant had knowledge of the drugs in the bag. The appellant submitted that she had no knowledge of the drugs which were well-concealed in the bag which was only given to her by her friend, one

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Held, by majority, dismissing the appeal:

- (1) **(per Stephen Chung JCA, majority)** On the evidence that the appellant flew from India via KLIA to Kuala Terengganu with the bag containing the drugs, the learned judge was entitled to infer that she had the knowledge and the nature of the drugs in the bag. If the appellant had

carried out a more careful examination, she would have seen the taped over damage to the inside of the bag and this would have alerted her suspicion. The appellant had the opportunity of examination but she closed her eyes to the taped over damage in the new bag and should have asked her friend about it. If a person deliberately shuts his/her eyes to the obvious, because he/she does not want to know, he/she is taken to know (see paras 37–38).

- (2) **(per Stephen Chung JCA, majority)** The appellant did not show nor produce any photograph of her friend or her telephone number to SP4 or SP5. These considerations raised questions about her friend Nguyen. Further, the appellant was supposed to meet Nguyen upon her arrival at the Kuala Terengganu airport but the name of Nguyen Thih Thanh Truc was not in the passenger list from Delhi to KLIA. The learned judge found Nguyen to be a fictitious person and the appellant was not credible. These were findings of facts. The learned judge also found that the appellant's explanations did not rebut the presumption nor raised any reasonable doubt in the prosecution's case and that the prosecution had proven its case against the appellant beyond reasonable doubt. On the evidence, the court found that the learned judge did not err and there was no appealable error which required appellant intervention. The conviction was safe and there was no merits in the appeal (see paras 39–40 & 42–43).
- (3) **(per Harmindar Singh JCA, dissenting)** It was significant that the impugned drugs were not visible to the naked eye. They were well concealed and were only found after a concerted effort by SP4 and that too after using a screwdriver to prise open one corner of the bag. It could not be said, by any stretch, that the appellant had knowledge of the drugs. Merely having custody and control did not equate to knowledge. In fact, the conduct of the appellant in remaining calm and fully cooperative with the police only served to disprove knowledge on her part. Without knowledge, the prosecution had failed to establish the ingredient of mens rea possession (see para 10).

[Bahasa Malaysia summary]

Perayu telah dituduh di Mahkamah Tinggi Kuala Terengganu untuk pengedaran dadah. Selepas perbincangan perayu telah didapati bersalah dan disabitkan dan dikenakan hukuman mati. Perayu telah tiba di Lapangan Terbang Kuala Terengganu melalui satu penerbangan transit dari Kuala Lumpur. SP4 dan SP5 memerhatikan perayu berjalan dengan perlahan mengangkat satu beg dalam keadaan teragak-agak. Perayu telah kemudiannya ditahan dan diarahkan untuk membawa bag tersebut kedalam sebuah bilik untuk pemeriksaan. Atas pemeriksaan teliti, mereka mendapati satu sudut beg telah diumpil buka dan di *cello-tape* kembali yang mana mereka telah menemui satu sampul berwarna coklat, selepas mengeluarkan *lining* dalam beg tersebut,

- A satu lagi sampul telah ditemui. Kedua-dua sampul ditemui mengandungi methamphetamine. Dalam rayuan ini, isu yang ditimbulkan adalah sama ada perayu mempunyai pengetahuan berkenaan dengan dadah di dalam beg tersebut. Perayu menghujahkan bahawa dia tiada pengetahuan berkenaan dengan dadah yang disembunyikan dalam beg tersebut yang telah diberikan kepada oleh rakannya, Nguyen Thih Thanh Truc ('Nguyen'), pada malam dia berlepas dari India ke KLIA. Perayu menghujahkan bahawa dia merupakan seorang pembawa tidak bersalah dan bahawa rakannya merupakan pengedar sebenar dadah tersebut.
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- C **Diputuskan**, oleh majoriti, mengetepikan rayuan:
- (1) **(oleh Stephen Chung HMR, majoriti)** Berdasarkan keterangan bahawa perayu telah terbang dari India melalui KLIA ke Kuala Terengganu dengan beg mengandungi dadah tersebut, Hakim terpelajar berhak untuk membuat kesimpulan bahawa dia mempunyai pengetahuan berkenaan dengan sifat dadah di dalam beg tersebut. Sekiranya perayu telah membuat pemeriksaan yang lebih teliti, dia akan melihat kesan kerosakkan yang ditampal atasnya di bahagian dalam beg dan ini akan menimbulkan syaknya. Perayu mempunyai peluang memeriksa tetapi dia telah membutakan dirinya kepada kesan kerosakkan yang ditampal didalam beg baru tersebut dan sepatutnya bertanya kepada rakannya mengenai perkara tersebut. Sekiranya seseorang dengan sengaja membutakan dirinya kepada perkara yang nyata, kerana dia tidak hendak mengetahui, dia dianggap sebagai mempunyai pengetahuan (lihat perenggan 37–38).
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- (2) **(oleh Stephen Chung HMR, majoriti)** Perayu tidak menunjukan atau mengemukakan apa-apa gambar rakannya atau nombor telefon kepada SP4 atau SP5. Perkara ini menimbulkan persoalan mengenai rakannya Nguyen. Lanjutan, perayu sepatutnya berjumpa dengan Nguyen setibanya dia di Lapangan Terbang Kuala Terengganu tetapi nama Nguyen Thih Thanh Truc tiada dalam senarai nama penumpang dari Delhi ke KLIA. Hakim terpelajar mendapati bahawa Nguyen merupakan seorang rekaan dan bahawa perayu tidak kredibel. Ini merupakan dapatan fakta. Hakim terpelajar juga mendapati bahawa penjelasan perayu tidak mematahkan anggapan atau menimbulkan apa-apa keraguan munasabah dalam kes pendakwaan dan pendakwaan telah membuktikan kesnya terhadap perayu melampaui sebarang keraguan munasabah. Atas keterangan mahkamah mendapati bahawa hakim terpelajar tidak terkhilaf dan tiada kesilapan yang boleh dirayu yang memerlukan campur tangan rayuan. Sabitan tersebut adalah selamat dan tiada merit dalam rayuan (lihat perenggan 39–40 & 42–43).
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- (3) **(oleh Harmandar Singh HMR, menentang)** Ianya adalah signifikan bahawa dadah tersebut tidak boleh kelihatan dengan mata kasar. Ianya

disembunyikan dengan baik dan hanya ditemui selepas usaha oleh SP4 dengan menggunakan pemutar skru untuk mengungkil buka satu sudut beg tersebut. Ianya tidak boleh dikatakan, bahawa perayu mempunyai pengetahuan dadah tersebut. Hanya dengan memilik pemilikan dan kawalan tidak terjumlah kepada pengetahuan. Malahan, pelakuan perayu dalam keadaan tenang dan berkerjasama dengan polis hanya mematahkan fakta bahawa dia mempunyai pengetahuan. Tanpa pengetahuan, pendakwaan telah gagal untuk memenuhi elemen mens rea pemilikan (lihat perenggan 10).]

Notes

For a case on knowledge, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 3136.

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780, FC (refd)

Ghasem Hozouri Hassan v Pendakwa Raya [2018] MLJU 601; [2018] 6 CLJ 133, FC (refd)

Ibrahim Mohamad & Anor v PP and another appeal [2018] supp MLJ 280; [2011] 4 CLJ 113, FC (refd)

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)

Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)

Munuswamy Sundar Raj v PP [2015] 6 MLJ 214, FC (refd)

PP v Herlina Purnama Sari [2016] 2 MLJ 724, CA (refd)

PP v Li Qian (W/N China) [2018] 6 MLJ 594; [2018] 7 CLJ 557, CA (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)

PP v Siti Nurhidayah [2019] 1 MLJ 794, CA (refd)

Sochima Okoye v PP [1995] 1 MLJ 538, CA (refd)

Venkatesan Chinnasami v PP [2011] MLJU 1530; [2011] 1 LNS 1736, CA (refd)

Yee Wen Chin v PP [2008] 6 MLJ 222, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(1), 37(d), (da), 39A(2), 39B(1)(a), (2)
Evidence Act 1950 s 8(2)

Ghazali bin Ismail (Ghazali Ismail & Co) for the appellant.

Dhiya Syazwani Izyan bt Mohd Akhir (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

A Harmindar Singh JCA (delivering dissenting judgment):

B [1] The appellant is a Vietnamese national. She was charged at the Kuala Terengganu High Court with trafficking in dangerous drugs, namely, 1,669.8g of methamphetamine which was an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the same Act. The offence was said to be committed at the Domestic Arrival Hall of Sultan Mahmud Airport in Kuala Terengganu on 9 November 2013.

C [2] After a trial, the appellant was found guilty, convicted and sentenced to death by the High Court on 27 March 2017. The appellant then filed this appeal.

D [3] The appeal was heard on 19 April 2019. At the conclusion of the submissions, the appeal was dismissed by a majority decision. Although I was in agreement with my learned sister and brother on most of the issues raised, I had, with respect, serious reservations on whether the learned trial judge was right that the prosecution had established the element of mens rea possession. I am therefore compelled to provide reasons for my dissenting view which now follow.

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AT THE HIGH COURT

F [4] The facts leading to the arrest of the appellant are set out in the majority judgment of Stephen Chung JCA and I am grateful for not having to repeat the same. In essence, the appellant was arrested at the Kuala Terengganu airport after she was found to have in her luggage bag dangerous drugs later ascertained by the chemist to be 1,669.8g of methamphetamine. The drugs were found in a corner of bag which appeared to have been opened and then sealed back with tape. It was SP4 who, after a detailed examination of the bag, found some damage at the corner of the bag. He then used a screwdriver to prise open the taped over corner and discovered the envelopes with the incriminating drugs inside.

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H [5] The learned trial judge correctly found that the appellant had custody and control of the bag. However, in order to prove knowledge, the learned judge appeared to rely on inferences from the surrounding circumstances to conclude that the appellant had knowledge or in other words mens rea possession. The learned judge then invoked the presumption of trafficking under s 37(da) of the Act based on the quantity of drugs and considered that a prima facie case had been established. The appellant was then ordered to enter her defence.

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THE APPEAL

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[6] This finding of prima facie was assailed by learned counsel for the appellant. It was argued that there was insufficient direct or circumstantial evidence for the learned judge to conclude that the appellant had knowledge.

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[7] In this respect, the learned judge appeared to rely on the conduct of the appellant to arrive at the conclusion that the appellant had knowledge. This is how the learned judge put it (at p 25 appeal record (Vol 1)):

32. Berkaitan dengan elemen pengetahuan jelas bahawa semasa OKT keluar beliau dalam keadaan seperti teragak-agak dan sentiasa melihat ke kiri dan ke kanan. Ini menunjukkan OKT sememangnya mengetahui di dalam penjagaannya dan kawalannya beg [P8] mengandungi dadah.

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[8] However, this view of the appellant's conduct was at odds with the testimony of SP4 who told the court that at the time of her detention, the appellant had behaved normally, was not alarmed and was calm. The evidence of SP4 at the trial was as follows (appeal record (Vol 1) at p 138):

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S: Bila kamu cakap pada sasaran macam itu kamu nampak atau tidak apa reaksi sasaran suspek tersebut?

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J: Saya dapati sasaran dalam keadaan biasa, tidak terkejut apa-apa, tenang dan ikut saya arahkan.

[9] It was, therefore, at least clear that two inferences could be made as to the conduct of the appellant at the material time of her arrest to show her knowledge of the impugned drugs. There is no question that under the law, both prior and subsequent conduct to the offence are relevant under s 8(2) of the Evidence Act 1950. In such a case, it is trite law that where there are two or more inferences that could be made, the inference most favourable to an accused person must be adopted (see *Ibrahim Mohamad & Anor v Public Prosecutor and another appeal* [2018] Supp MLJ 280; [2011] 4 CLJ 113; *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457).

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[10] In the circumstances, the finding of the learned judge on mens rea possession through inferences cannot be sustained. It was significant that the impugned drugs were not visible to the naked eye. They were well concealed and were only found after a concerted effort by SP4 and that too after using a screwdriver to prise open one corner of the bag. It could not be said, by any stretch, that the appellant had knowledge of the drugs. Merely having custody and control does not equate to knowledge. In fact, the conduct of the appellant in remaining calm and fully cooperative with the police only served to disprove

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A knowledge on her part. Without knowledge, the prosecution had failed to establish the ingredient of mens rea possession.

B [11] In my view, the learned judge was in grave error when he evaluated the evidence of the prosecution and made the inference of knowledge based on the appellant's conduct. Now, the learned judge was fully aware that when custody and control is established, under s 37(d) of the Act, an accused may be deemed to have in his possession the drug and to have known the nature and the nature of such drug until the contrary is proved (see para 30 of the grounds of judgment). Nevertheless, the presumption of possession and knowledge was not applied probably for the reason that the presumption of trafficking under s 37(d) of the Act was also applied and there was probably an awareness of the rule against the application of double presumptions on the part of the learned judge (at that time *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 was applicable).

C [12] There was also no submission by the prosecution that possession and knowledge was established through the invocation of the presumption under s 37(d) of the Act. Instead, before this court, they dug in their heels to maintain their position that knowledge had been proved by inferences from the surrounding circumstances and argued that the learned judge was right in his finding.

D [13] Be that as it may, there was more than sufficient evidence that the appellant was in custody and control of the bag which contained the drugs which formed the subject matter of the charge. In such a case, the law provides vide s 37(d) of the Act that where the fact of custody and control is proved, possession and knowledge of the dangerous drug will be presumed. A prima facie case of presumed possession would then be established as opposed to actual possession which is the parlance used in some judgments. For the reasons given by my learned brother Stephen Chung JCA, the finding of possession was not displaced by the evidence of the appellant such that possession was proved beyond reasonable doubt.

E [14] As it is now settled through the recent judgment of the Federal Court in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780 that the presumption of trafficking cannot be applied together with the presumption of possession, it will not be permissible to convict the appellant on the charge of trafficking by use of the presumption as was done by the learned trial judge in the present case.

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CONCLUSION

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[15] Given the circumstances, and for the reasons given, there were merits in the appeal and appellate intervention was warranted. The conviction on the charge for trafficking was unsafe. Accordingly, the appeal was allowed. The conviction and sentence passed by the High Court was set aside and substituted with conviction for possession under s 12(1) and punishable under s 39A(2) of the Act.

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Stephen Chung JCA (delivering majority judgment):

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THE APPEAL

[16] The appellant was charged for trafficking in dangerous drugs under the Dangerous Drugs Act 1952 ('the DDA'). The charge reads as follows:

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Bahawa kamu pada 9/11/2013 lebih kurang jam 9.30 pagi, bertempat di Pintu Keluar Balai Ketibaan Domestik, Lapangan Terbang Sultan Mahmud, di dalam Daerah Kuala Terengganu, di dalam Negeri Terengganu, telah memperedarkan dadah berbahaya iaitu Methamphetamine seberat 1669.8 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

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[17] After a trial, the appellant was found guilty, convicted and sentenced in accordance with the law. The appellant had appealed against the conviction and sentence.

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THE FACTS OF THE CASE

[18] On 9 November 2013 the appellant arrived at the Kuala Terengganu airport via a transit flight from Kuala Lumpur. SP4 and SP5 saw the appellant walking slowly, looking to the left and right, with hesitation and carrying a large bag (P8). SP5 followed the appellant and gave a gesture to SP4. They detained and instructed the appellant to bring the bag to a room for inspection. They found some lady garments which were not proportionate to the heavy weight of the bag. Upon a close inspection, they saw a corner of the bag which had been prised opened and cello-taped over. After prising with a screwdriver at the said corner, they found a brown envelope. After removing the inside lining of the bag, another envelope was found. Both envelopes contained crystalline substance suspected to be dangerous drugs. The government chemist (SP3) analysed the substance and found it contained 1,669.8g of methamphetamine. The learned judge found the appellant to be in possession and trafficking in the said drug by invoking the presumption under s 37(da) of the Act and called upon the appellant to present her defence.

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- A [19] The appellant testified that she came to Malaysia upon the request of her friend by the name of Nguyen Thih Thanc Truc to look for a job and to find a suitor. She was asked to travel to India first before going to Malaysia and had stayed at her friend's house in India. She said the wheels on her trolley bag were damaged and her friend brought her to buy a new luggage bag (P8). One day before departure to Malaysia, her friend told her that the new bag had a problem and had to be repaired. She said the bag was returned to her on the night before she left for Malaysia. The appellant said she had no knowledge of the dangerous drugs found in the bag.
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C THE APPELLANT'S SUBMISSION

- D [20] The appellant submitted that the learned High Court judge had erred in finding that the appellant had possession and knowledge of the drugs which were found in the bag. It was submitted that since the appellant was carrying the bag at the airport, custody and control of the bag was not an issue in this appeal. However, the question was whether the appellant had knowledge of the drugs in the bag.

- E [21] The appellant submitted that she was travelling to Terengganu for the first time and did not know the Malay or English language and could not read the signs at the airport. The appellant contended that her friend would be waiting for her at the Kuala Terengganu Airport but she could not contact her friend because of her low cellphone battery. It was submitted that when SP4 and SP5 introduced themselves as police, she looked normal, not surprised but calm and followed their instructions. It was submitted that her demeanour of looking hesitant was consistent with what SP5 had described. Unfortunately the learned High Court judge failed to consider these facts in drawing the inference that the appellant had knowledge because of her demeanour. If these were taken into account, the learned judge would have drawn some other inferences that she had no knowledge of the drugs.
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- H [22] It was submitted that the learned High Court judge failed to consider that the appellant was simply an innocent carrier. The appellant had explained that the bag was given to her to replace her damaged bag before leaving for Malaysia. It was submitted that the drugs were concealed so thoroughly that only after careful checks could the drugs be found. It was submitted that SP4 used the screwdriver to open the compartment used to hide the drugs inside the bag. It was submitted that she only carried out an ordinary inspection of the bag when the bag was handed to her and she did not suspect anything nor did she suspect that her friend would conceal the drugs in the bag. The appellant submitted that her friend was the real trafficker and she was an innocent carrier. It was submitted that the prosecution had failed to prove its case beyond
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reasonable doubt against the appellant and that she should be acquitted and discharged.

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THE PROSECUTION'S SUBMISSION

[23] The learned judge had found that the appellant had the knowledge and possession of the dangerous drugs found in the bag and correctly invoked the presumption under s 37(da) of the Act that the appellant was trafficking in the drugs and based on the large quantity of drugs found to be in the possession of the appellant.

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[24] The learned judge was correct in rejecting the appellant's defence and found that the character Nguyen Thih Thanh Truc was a mere 'fictitious character' and no '*Alcontara* notice' was given by the appellant. Further, no information was provided regarding the address of the Nguyen either in Vietnam or in India.

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[25] The learned judge also found that the appellant was not a innocent carrier because the doctrine of wilfull blindness was applicable to her when the appellant did not check the contents of the bag and she had enough time and opportunity to do so. The manner in which the drugs were hidden and the weight of the bag was not proportionate to the contents of her garments.

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OUR DECISION

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[26] On evidence, the appellant traveled from Vietnam via India, on transit at KLIA, and arrived at the Kuala Terengganu airport on 9 November 2013 at about 9.10am where she was seen carrying the bag (P8) exiting the airport terminal building. She was detained by SP4 and SP5 and the drugs were found concealed in the bag. The learned judge found the appellant to be in custody and control of the bag and that based on the drugs found concealed in the bag, which she took from India to Malaysia, that she had knowledge of and the nature of the drugs in the bag. The learned judge found that the appellant was in possession of the drugs and invoked the presumption under s 37(da) of the Act that she was trafficking in the drugs. After hearing the defence, the learned judge found that the appellant had failed to rebut the presumption of trafficking and failed to raise any reasonable doubt in the prosecution's case. The appellant was then convicted and sentenced according with the law.

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[27] On the facts, it was not in dispute that the appellant had custody and control of the bag which contained the drugs. Counsel for the appellant had conceded as much that the appellant was carrying the bag at the airport and had custody and control of the bag and that this was not an issue in the appeal.

A [28] However, the appellant submitted that she had no knowledge of the drugs which were well-concealed in the bag which was only given to her by her friend on the night of her departure from India to KLIA. The appellant contended that she was an innocent carrier and that her friend was the real trafficker of the drugs. We shall deal with these issues.

B [29] In *Venkatesan Chinnaasami v Public Prosecutor* [2011] MLJU 1530; [2011] 1 LNS 1736, the Court of Appeal put it aptly that a defence of innocent carrier referred to a state of affairs where an accused person acknowledged carrying a bag containing the drugs but disputed having knowledge of the drugs and whether the defence would succeed or not would very much depend on the facts of each case. This is a matter that falls within the realm of the trial judge and an appellate court will be slow to interfere with the finding of facts of the trial judge unless it is plainly wrong.

D [30] It has been held that ignorance simpliciter is not sufficient to let an accused person off the hook as otherwise every other accused person will invoke that defence. It needs more than that. Ignorance may be a good defence when there is no reason for suspicion and no right or opportunity for examination. The defence of innocent carrier must necessarily bring in the concept of wilful blindness: *Munuswamy Sundar Raj v Public Prosecutor* [2015] 6 MLJ 214.

F [31] The evidence showed that on 16 October 2013 the appellant left Vietnam for India where she stayed with her friend. She left Delhi on 8 November 2013, arriving at KLIA on 9 November 2013 at about 7am on transit, and arriving at the Kuala Terengganu airport on the same day at about 9.10am where she was arrested with the bag and the drugs (see P27(b)). According to SP2, the bag was checked in from Delhi via KLIA to Kuala Terengganu. There was no allegation and no evidence that the bag was tampered with during the journey.

H [32] We referred to the testimony of SP4 who testified that the appellant was the last person from the flight to leave the terminal carrying the bag, after the other passengers had left. She looked hesitant, looking left and right. He, together with SP5, stopped the appellant, checked her passport and instructed her to follow them to a room to inspect her bag. Since she had a Vietnamese passport, SP4 decided to speak in English and was not sure whether she could speak English but the appellant was able to follow their instructions. He instructed her to open the bag for inspection. He saw some female garments in the bag and took them out. He lifted the bag, it felt heavy and he suspected it contained something else because the garments were not heavy. He made a visual inspection of the inside of the bag which did not alert him of anything suspicious. He then made a more detailed examination of the interior of the bag. At a corner, at the bottom of the bag, he saw as if it was damaged and taped

over. He lifted the tape and used a screw-driver to prise open that part of the bag and saw what looked like a brown envelope. He prised open further and removed the envelope which was covered with brown tape. He then found and removed a second similar envelope. On inspection, they contained crystalline substance which SP3 found to be methamphetamine. These facts were not in dispute.

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[33] The appellant denied that the drugs belonged to her and she had no knowledge of the drugs which were found in the bag. She said the bag was only given to her by her friend on the night she left for KLIA. She only had a quick look of the interior of the bag and she did not suspect anything because Nguyen Thih Thanh Truc was her good friend who would meet her when she arrived at the Kuala Terengganu airport. She submitted that she was not able to contact this friend upon arrival because of low phone battery. It was submitted that she was in no position to know of the drugs which were so well-concealed unless she used a screwdriver. The appellant relied on the case of *Public Prosecutor v Li Qian (W/N China)* [2018] 6 MLJ 594; [2018] 7 CLJ 557 to support her contention that she was an innocent carrier and not the trafficker.

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[34] We were referred to several cases on the defence of innocent carrier. Each case must be read based on the facts of each case. In *Public Prosecutor v Li Qian*, the drugs were completely hidden behind the metal pull of the luggage which were not noticeable to her even if the luggage was opened. The trial judge found her a witness of truth and her evidence to be credible. Also she was not cross-examined if she had any suspicion or made any attempt to check the luggage carefully. The trial judge found that the respondent had succeeded in her defence and was acquitted and discharged. The appeal to the Court of Appeal was dismissed. In *Public Prosecutor v Herlina Purnama Sari* [2016] 2 MLJ 724, the accused claimed that she worked for an Indonesian woman by the name of Vivian who asked her to go to meet Vivian's friend (Jo) to collect some things before proceeding to Laos. She claimed she was given her new luggage and a plastic bag to be given to Jo's friend in Laos. Without any suspicion, she put the plastic bag inside the luggage. The evidence showed that Vivian was arrested by the Indonesian authority in connection with a drug related offence. The trial judge found that her defence was neither a bare denial nor an afterthought which had been put to the prosecution's witnesses. The prosecution's appeal was dismissed. Similarly, in *Public Prosecutor v Siti Nurhidayah* [2019] 1 MLJ 794, the respondent in that case claimed that she brought the bag on the instruction of her friend Tina (Titin Sukmawati) who later testified as DW2 that she was the Tina referred to. The trial judge found that she had raised a reasonable doubt in the prosecution's case and acquitted and discharged her. The prosecution's appeal was dismissed.

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[35] However, many were confused or misconstrued the *Radhi* direction,

- A that it was about who is the real trafficker. In *Public Prosecutor v Siti Nurhidayah*, the Court of Appeal referred to the decision of Gopal Sri Ram JCA (as he then was) in *Yee Wen Chin v Public Prosecutor* [2008] 6 MLJ 222 (CA) which explained the directions given in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169, relying on his own decision in *Sochima Okoye v Public Prosecutor* [1995] 1 MLJ 538, where it was held that in that case (Radhi's case) it was 'an authority for the proposition that a person charged with trafficking was entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker. This is called the *Radhi* direction and must be administered by a court unto itself when such a defence is taken'.

- [36] The apex court in *Ghasem Hozouri Hassan v Pendakwa Raya* [2018] MLJU 601; [2018] 6 CLJ 133 had ruled that both the above cases are instances where the Court of Appeal had misconstrued what the then Supreme Court meant by separate exercise. The apex court was of the view that the separate exercise is surely not an exercise to determine the real trafficker, but as stated on *Mohamad Radhi*, the separate exercise is an exercise by the court to consider whether on a balance of probabilities on the evidence, the defence has rebutted the statutory presumption of trafficking as a separate exercise even though the court is satisfied on a balance that the presumption of possession has not been rebutted. Therefore the case of *Public Prosecutor v Siti Nurhidayah* must be read in the light of the decision in *Ghasem Hozouri Hassan v Public Prosecutor*.

- G [37] Coming back to the facts of this case, SP4 after finding that the few garments in the bag were not proportionate to the weight of the bag, he became suspicious and carried out a more detailed examination of the bag where he saw some damage taped over at a corner of the bottom of the bag. He lifted the tape and used the screwdriver to prise it open and discovered the envelopes containing the drugs. On the evidence that the appellant flew from India via KLIA to Kuala Terengganu with the bag containing the drugs, the learned Judge was entitled to infer that she had the knowledge and the nature of the drugs in the bag. If the appellant had carried out a more careful examination, she would have seen the taped over damage to the inside of the bag and this would have alerted her suspicion.

[38] The appellant explained that the wheels to her trolley bag were damaged and her friend took her to buy a new bag. She inspected the bag before she bought it and did not complain of any damage and there should not

be any damage to the inside of the new bag. She said it was her friend who told her there was a problem with the new bag and took it for repair. She said she managed to have a quick inspection because the new bag was only given to her on the night before departure for KLIA. She did not say what time and how much time before she departed for KLIA. Looking at her narrative, her explanations did not tally. She had the opportunity of examination but she closed her eyes to the taped over damage in the new bag and should have asked her friend about it. She did not. If a person deliberately shuts his/her eyes to the obvious, because he/she does not want to know, he/she is taken to know: as per Professor Glanville Williams cited in *Munuswamy Sundar Raj v Public Prosecutor*.

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[39] Further, she said her friend asked her to come to Kuala Terengganu, Malaysia to look for work and to find a suitor and that this friend would meet her at the airport upon her arrival. She said she could not contact her friend due to the telephone's low battery. However, she did not ask SP4 or SP5 to try to contact her friend and her friend would have turned up anyway if what she said was true. The appellant did not show nor produce any photograph of her friend or her telephone number to SP4 and SP5. These were not shown in court (see D33). These considerations raised questions about her friend Nguyen Thih Thanh Truc.

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[40] The appellant supposedly stayed with this friend in India who gave her the bag the night before her departure for KLIA and was supposed to meet her upon her arrival at the Kuala Terengganu airport. This could not be possible unless her friend took an earlier flight from India in order to meet her in Kuala Terengganu or unless they were on the same flight which again would contradict her explanation that this friend would meet her at the Kuala Terengganu airport. The name of Nguyen Thih Thanh Truc was not in the passenger list from Delhi to KLIA (see D9).

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[41] The evidence showed that the appellant had bought her ticket departing from KLIA to Ho Chi Minh City on 14 November 2013 (see P27(a)). This meant she was in the country for only six days, from 9–14 November, 2013, and could not be looking for work nor getting married in the country. She did not have any work permit and did not tender evidence that she was getting married in the country. Again her explanations did not tally.

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[42] All these inconsistencies pointed to her not being truthful about her journey to Kuala Terengganu or to Malaysia. She could have flown directly from Ho Chi Minh City to KLIA instead of via India. Of course according to her she was to meet with this friend in India who gave her the bag. The learned judge found Nguyen Thih Thanh Truc to be a fictitious person and that the

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A appellant was not credible. These were findings of facts. The learned judge also found that her explanations did not rebut the presumption nor raised any reasonable doubt in the prosecution's case and that the prosecution had proven its case against the appellant under the charge beyond reasonable doubt.

B [43] On the evidence before us, Justice Umi Kalthum bt Abdul Majid and I by a majority decision, found that the learned judge did not err and there was no appealable error which required appellate intervention. We were of the view that the conviction was safe and there were no merits in the appeal. The appeal was dismissed and we affirmed the order of the High Court.

C *Appeal dismissed by majority.*

Reported by Izzat Fauzan

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